Supreme Court, U.S.
FILED
SEP 29 1993
OFFICE OF THE CLERK

No. 93-376

IN THE SUPREME COURT OF THE
UNITED STATES,
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, et al.
Respondents.

STANTON ROAD ASSOCIATES,
Petitioner,

v.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC., DAVID
LOHREY AND NATHAN PANG,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John H. Reaves
LAW OFFICES OF JOHN H. REAVES
701 "B" Street, Suite 1300
San Diego, California 92101
(619) 525-2050
Attorney for Gloria Price

No. 93-376

IN THE SUPREME COURT OF THE
UNITED STATES,
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, et al.
Respondents.

STANTON ROAD ASSOCIATES,
Petitioner,

v.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC., DAVID
LOHREY AND NATHAN PANG,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John H. Reaves
LAW OFFICES OF JOHN H. REAVES
701 "B" Street, Suite 1300
San Diego, California 92101
(619) 525-2050
Attorney for Gloria Price

TABLE OF CONTENTS

		Page
I.	INTEREST OF PRICE IN THE PETITION	4
II.	ARGUMENT	8
	A. BACKGROUND OF LEGAL ISSUE	8
	B. THE UNITED STATES' GOAL OF CLEANING UP CONTAMINATED SITES WILL BE SEVERELY UNDERMINED UNLESS ATTORNEYS' FEES ARE RECOVERABLE AS RESPONSE COSTS UNDER CERCLA	15
	C. DEFENDANTS' LITIGATION STRATEGIES ARE AFFECTED BY WHETHER A PLAINTIFF CAN RECOVER ATTORNEYS' FEES UNDER CERCLA	17
	D. THE DISADVANTAGED PLAINTIFF PAYS THE MOST IF ATTORNEYS' FEES ARE NOT RECOVERABLE	19
III.	SUMMARY OF ARGUMENT	21
IV.	CONCLUSION	22

TABLE OF AUTHORITIES

Case	Page
Wilshire Westwood Association v. Atlantic Richfield 881 F.2d 801 (9th Cir. 1989) . .	12
Statutes	
42 U.S.C. § 9601	1
42 U.S.C. § 9601(25)	1
42 U.S.C. § 9606(a)	10
42 U.S.C § 9607(a)	1, 7, 9, 11
42 U.S.C. § 9613(i)	11
42 U.S.C. § 9620(a)(1)	15
55 Fed.Reg. at 8792-93 (March 8, 1990)	12
Other	
H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 1985 (1986)	9
H.R. Rep. No. 253, 99th Cong., 1st Sess. pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2835, 2848-49	9

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Gloria Price files this amicus brief in support of the Joint Petition for Writ of Certiorari to United States Supreme Court by Key Tronic Corporation and Stanton Road Associates ("Petitioners"). Petitioners seek resolution of the conflict among five circuit courts as to whether the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., allows recovery of attorneys' fees as "response costs" pursuant to 42 U.S.C. §§ 9601(25)[1] and 9607(a)[2]. For the

---

[1] 42 U.S.C. § 9601(25) states:

> The terms "respond" or "response" means remove, removal, remedy and remedial action, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

[2] 42 U.S.C. § 9607(a) states:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(continued...)

2/ (...continued)

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or

(continued...)

following reasons, Gloria Price ("Price") supports the Petition and urges the resolution of the current conflict in the circuit courts. All parties have consented to Price filing the amicus brief.[3]

---

[2] (...continued)

> loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i).
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Service Code of 1954. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

[3] Kathryn L. Tucker, on behalf of the Petitioners, granted permission for Price to file her amicus brief by letter dated September 7, 1993; Drew S. Days, III, Solicitor General, on behalf of the United States, granted permission by letter dated September 16, 1993; and Howard L. Pearlman, on behalf of Lohrey Enterprises, Inc, Electronic Valet Systems, Inc., David Lohrey and Nathan Pang, granted permission by letter dated September 17, (continued...)

I.

INTEREST OF PRICE IN THE PETITION

On October 29, 1989, Price and related family members filed suit against the United States Navy ("Navy") and other parties to recover response costs, including attorneys' fees, under CERCLA. She incurred such costs in responding to hazardous levels of asbestos, lead, copper and zinc in her residential backyard discovered during the excavation for a pool. At the time of discovery of those hazardous substances, in October 1988, Price was in the process of moving into the residence after her mother had died and she and her siblings had acquired their mother's residence. Until October 1988, the Price family did not know, and had no reason to suspect, that hazardous substances had been dumped there in the mid-1930s by the Navy and that hazardous

---

3/ (...continued)
1993. Copies of all letters are attached hereto as Exhibit "A".

levels of such substances ranged from the surface to about three feet in depth.

Governmental agencies, including the United States Environmental Protection Agency ("US EPA"), California Department of Health Services and the San Diego County Department of Health Services, each played a role in investigating the contamination problem which was found to encompass four residential properties (the "site").

To no avail, the governmental agencies requested assistance from the Navy in determining whether the Navy had been involved in dumping hazardous substances at the site due to reports by eye witnesses that there was a "Navy dump" on the site in the mid-1930s. Also, Navy artifacts were found buried at the site. The Navy never admitted any responsibility for the site nor contributed to resolving the problem. Instead, in December, 1989, the State of California proceeded to clean

up the yards of the affected properties at a price of nearly half a million dollars.

As early as February 1989, Price contacted the Navy, requesting information as well as assistance. In June 1989, Price gave a sixty (60) day notice of intent to file a lawsuit under CERCLA. Never receiving any meaningful response, she filed a lawsuit in October, 1989.

Price quickly conducted discovery and then informed the court she was prepared to file a motion for summary adjudication on the sole issue of the Navy's liability under CERCLA. The Navy repeatedly sought to forestall such hearing, claiming a need for additional discovery into the subject of response costs; the Navy successfully forestalled the motion for nearly two years.

The court finally granted Price permission to file her motion for partial summary adjudication. The Navy, in its opposition to Price's motion, conceded for

the first time that it had transported the aforementioned hazardous substances to the site in the mid-1930s. On April 13, 1992, the court ruled the Navy was liable under 42 U.S.C § 9607(a) of CERCLA.

Thereafter, Price filed a second motion for partial summary adjudication as to whether "response costs" under CERCLA included attorneys' fees. On June 25, 1992, the court ruled that reasonable attorneys' fees were recoverable as "response costs" under CERCLA. By the time the court found the Navy liable under CERCLA, attorneys' fees were already over one quarter of a million dollars.

In September 1992, trial was assigned to another judge. That judge denied the Navy's motion for reconsideration on the issue of attorneys' fees. At the Navy's urging, the court required evidence of reasonable attorneys' fees to be presented at trial instead of in a post-trial cost bill as the initial judge had

contemplated. Price presented expert testimony that the reasonable attorneys' fees, using a lodestar calculation, were over $400,000. After trial, again at the Navy's urging, the court allowed briefing on the issue of billing discretion. Several weeks later and shortly before the Ninth Circuit's ruling in Key Tronic and Stanton Road, the court reversed itself and held attorneys' fees were not recoverable under CERCLA.

Price's appeal to the Ninth Circuit, raising the attorneys' fee issue under CERCLA as well as other issues, is currently pending. (Gloria Price v. United States Navy, et al., No. 93-55447.)

II.

ARGUMENT

A. **BACKGROUND OF LEGAL ISSUE**

Legislative history from one House Committee shows that the amendment of "response" under CERCLA in 1986 to include "enforcement costs related thereto" was

intended to clarify and confirm that enforcement costs are recoverable from responsible parties as removal or remedial costs under 42 U.S.C. § 9607(a). H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 1985 (1986).

In a separate Committee report, however, Congress expressly stated the amendment confirmed EPA's authority to recover its enforcement costs. However, that report is silent as to the ability of private parties to recover enforcement costs. H.R. Rep. No. 253, 99th Cong., 1st Sess. pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2835, 2848-49. For that reason, some courts question whether Congress intended private parties to be able to recover "enforcement costs".

CERCLA does not define "enforcement". Although intertwined and often not distinguished, there are really two separate issues that were not expressly addressed by Congress regarding private parties'

recovery of enforcement costs. First, did Congress intend private parties to bring "enforcement actions", so as to conclude private parties engage in "enforcement activities"? Second, if private parties do engage in "enforcement activities", did Congress intend them to recover "enforcement costs" against responsible parties, including the United States? Price contends a private party's cost-recovery action is an enforcement action for the following reasons.

First, private cost-recovery actions are brought precisely because the EPA has chosen *not* to initiate litigation. The EPA has options to initiate an abatement action (42 U.S.C. § 9606(a)[4/]), cost-

---

[4/] 42 U.S.C. § 9606(a) states:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as

(continued...)

recovery action (42 U.S.C. § 9607(a)), or to intervene after receiving notice of a private party's intention to file a cost-recovery action (42 U.S.C. § 9613(i)[5]).

Second, both private parties and the EPA appear to engage in "enforcement activities" to the extent they seek to *enforce* CERCLA's strict liability provisions upon responsible parties.

---

[4] (...continued)

> may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

[5] 42 U.S.C. § 9613(i) states:

> (i) INTERVENTION. - In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by the existing parties.

CERCLA is a remedial statute to be broadly construed to avoid frustration of its beneficial legislative purposes. Wilshire Westwood Association v. Atlantic Richfield, 881 F.2d 801, 804 (9th Cir. 1989).

Third, it is EPA policy to encourage private party cleanups which would otherwise be left to the EPA. The EPA has expressly encouraged private cleanups and the removal of unnecessary obstacles to said cleanups:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.

55 Fed.Reg. at 8792-93 (March 8, 1990).

Those courts allowing private parties to recover enforcement costs have not found Congressional silence on either point to be troubling. Instead, they have

read CERCLA "as a whole" by (1) focusing on the "plain" meaning of the phrase "enforcement activities related thereto" as a "response cost" and then (2) giving full effect to the statutory right that "any person", not just the government, may recover necessary "response costs", pursuant to 42 U.S.C. § 9607(a).

Congressional silence on the meaning of "enforcement activities" and the lack of express pronouncement regarding "attorneys' fees", however, have been raised as stumbling blocks to private party recovery of enforcement costs against responsible parties under CERCLA, including the United States. Those courts denying attorneys' fees cite the absence of an express provision allowing recovery of "attorneys' fees" and rely upon the "general rule" that a prevailing private party must absorb its own litigation costs.

/ / /

Price contends, however, that "enforcement activities" are purposefully broader than and inclusive of legal activities. The recovery of enforcement costs should include attorneys' fees as well as other enforcement costs. In other words, Congress meant exactly what it said.

Those courts allowing recovery of attorneys' fees also face the secondary issue of whether a party can recover such fees against the United States. CERCLA contains a waiver of sovereign immunity which reads as follows:

> **Application of Act to Federal Government.** (1) In general, each department, agency, and instrumentality of the United States (including the executive, legislative and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under Section 107 of this Act.

42 U.S.C. § 9620(a)(1).

Price contends the foregoing section should allow recovery of enforcement costs by private parties against the United States.

B. **THE UNITED STATES' GOAL OF CLEANING UP CONTAMINATED SITES WILL BE SEVERELY UNDERMINED UNLESS ATTORNEYS' FEES ARE RECOVERABLE AS RESPONSE COSTS UNDER CERCLA**

The US EPA must enlist the voluntary participation of parties, such as Price, to achieve its goal of cleaning up America's contaminated sites. Price paid approximately $30,000 to remove or contain the excavated, contaminated soils on her property after which the governmental agencies then decided how to fully address the problem.

In the case involving Price, the United States has had an inherent conflict of interest which has resulted in the Navy undermining the goal of the US EPA: the US EPA, as an enforcer of the United States' environmental laws, has had a conflict

with the Navy as a defendant trying to reduce its liability for the contamination it caused.

To complicate matters, the United States has unlimited resources, relatively speaking, to wear down plaintiffs who seek to recover CERCLA response costs. In the case of Price, for example, Price lacked the personal resources to pay for major CERCLA litigation, although she managed to belatedly pay a substantial portion of her legal fees due to settlements in other insurance litigation. Perhaps as a result of her lack of resources, the Navy never expressed any genuine interest in settling her claim or resolving the case through alternative dispute resolution. Instead, the Navy offered to settle the case for $1.99 prior to when the court ruled it was liable under CERCLA and $5,000 after that time.

The Navy left no option to Price but to go to trial or give up the claim and

for her counsel to absorb most of the risks. As long as the United States or other well-financed defendants can litigate in an oppressive manner with impunity, parties will be deterred from voluntarily cleaning up contamination and pursuing a cost-recovery action under CERCLA.

C. **DEFENDANTS' LITIGATION STRATEGIES ARE AFFECTED BY WHETHER A PLAINTIFF CAN RECOVER ATTORNEYS' FEES UNDER CERCLA**

An unfortunate by-product of the adversarial system is that defendants with superior economic strength will often try to wear down a plaintiff financially. If no attorneys' fees are recoverable under CERCLA, defendants will be given an overwhelming advantage when faced with an economically disadvantaged plaintiff; such advantage will encourage the offensive defense of attrition.

The greatest obstacle, therefore, to the voluntary participation in a cleanup is the inability of a party who has

incurred response costs to be made whole under CERCLA or to pass the full costs of pollution onto the polluting party if attorneys' fees are not recoverable. Accordingly, the resolution of the issue of attorneys' fees has tremendous national significance.

Such limitation is particularly poignant in the case of Price because she did not cause the pollution and she inherited the property without knowing it was contaminated. She then incurred response costs, and the Navy denied any liability or responsibility for three and one-half years before conceding it had transported hazardous substances to her site. Moreover, the Navy was unwilling, even then, to try to settle the matter in good faith. Had the Navy understood it would have to pay attorneys' fees if Price proved the Navy liable under CERCLA, then it would have had a more difficult time

/ / /

justifying stonewalling or fighting her meritorious claim the way it did.

D. **THE DISADVANTAGED PLAINTIFF PAYS THE MOST IF ATTORNEYS' FEES ARE NOT RECOVERABLE**

From a legal perspective, Price's case had merit, and she ultimately prevailed at trial in that the Navy was held liable for response costs she incurred. Price may have won the battle, but she clearly lost the war due to the denial of attorneys' fees.

As a practical matter, Price represents that large class of people who, due to their poor financial condition, are unable to secure legal representation unless counsel takes the matter on contingency. Given the extremely complicated, long-term, expensive and risky nature of CERCLA litigation, such representation is virtually impossible to find without the possibility of a prevailing party recovering its attorneys' fees. If such fees are not recoverable

under CERCLA, voluntary participation in the cleaning up of contaminated sites will be substantially diminished; parties such as Price will likely forego voluntarily devoting any resources to the cleanup of other parties' pollution, knowing a cost-recovery action cannot make them whole but will put them in a far worse position than if they had done nothing.

Attorneys, such as myself, will not be willing to take cases such as the Price lawsuit on a contingency basis. I was a sole practitioner when I took the Price case. The financial strains proved crushing. In large part due to that, I joined a law firm during the critical two years leading up to trial to muster resources to press Price's case forward. I proceeded under the assumption CERCLA allowed recovery of attorneys' fees. Price likely would not have gone to trial if the district court had not initially

/ / /

held that attorneys' fees are recoverable under CERCLA.

III.

SUMMARY OF ARGUMENT

Price's interest in the resolution of the above-entitled matter is based on her pending appeal to the Ninth Circuit. Price's appeal raises a number of issues, including recoverability of attorneys' fees under CERCLA.

Price contends that attorneys' fees are enforcement costs under CERCLA and that private parties' cost-recovery actions are enforcement actions under CERCLA, thereby allowing the recovery of attorneys' fees. The recovery of attorneys' fees by private parties is critical to the United States' goal of invoking the voluntary assistance of its citizens in the cleaning up of contamination caused by others. This is especially true when response costs are incurred by innocent parties and the

contamination is caused by defendants who might seek to wear down plaintiffs in order to gain an unfair advantage. If defendants know in advance they will be held liable for attorneys' fees, extensive litigation will likely be reduced, justice will be served and more money will be spent on actually cleaning up contaminated sites.

IV.

CONCLUSION

Although the court found Price was not responsible for the contamination on her property, and awarded her some response costs, there is no question that the costs of litigation have resulted in a pyrrhic victory. The costs have been far too high, both to Price and her counsel, if attorneys' fees are not recoverable.

Cost-recovery actions under CERCLA have burgeoned over the last several years. Undue judicial time and tremendous litigant resources will continue to be

consumed until this Court issues the final word on the subject of attorneys' fees. Price and other parties similarly situated have devoted considerable resources to acting responsibly by voluntarily cleaning up contaminated sites and then seeking recovery of response costs from responsible parties who have shirked their responsibility. It is important to equitably and uniformly apply CERCLA throughout the United States. The issue of attorneys' fees has tremendous national significance. For these reasons, Price respectfully requests this honorable Court to accept the Joint Petition for Writ of Certiorari.

Respectfully submitted,

LAW OFFICES OF JOHN H. REAVES

By:
John H. Reaves,
Attorney for Gloria Price

Dated: September 27, 1993